

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOYCE MIZELL)	
Claimant)	
)	
VS.)	
)	
ANGEL ARMS HOME HEALTH)	
Respondent)	Docket No. 1,052,468
)	
AND)	
)	
COMMERCE AND INDUSTRY INS. CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the December 22, 2010 preliminary hearing Order entered by Special Administrative Law Judge, C. Stanley Nelson.

ISSUES

The Special Administrative Law Judge (SALJ) found that claimant has failed to bear her burden of proof as required by K.S.A. 44-501(a) and K.S.A. 44-508(g) that her current request for additional treatment, including psychiatric evaluation and treatment (other than for the right leg DVT) is related to the injury she sustained on January 11, 2010. Therefore claimant's request for additional treatment was denied.¹

Claimant requests review of the SALJ's decision. First, claimant acknowledges that she was undergoing treatment with her chiropractor for injuries sustained in an automobile accident on December 26, 2009. However, claimant goes on to suggest that the SALJ failed to acknowledge the fact that her chiropractor was the first to see her immediately after her work-related accident and that he, Dr. Porter, acknowledged additional and new complaints to her right side and lower back. Second, claimant points to Dr. Flutter's

¹ Respondent agreed to provide ongoing treatment with Dr. Gorman, related to claimant's injury and her continued problems with DVT in the right leg.

subsequent evaluation in October 2010, which acknowledges the entirety of claimant's present physical complaints which he attributes to the work-related accident. Accordingly, claimant argues that the greater weight of the evidence supports her contention that she requires additional treatment to her low back, right hip and knee as well as an evaluation for her psychiatric complaints.

Respondent has not filed a brief, but would presumably argue that the Order should be affirmed. As indicated at the preliminary hearing, respondent believes claimant's low back and right hip complaints are attributable to a motor vehicle accident that occurred on December 26, 2009, before the work related injury which is the focus of this claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The SALJ's Order accurately and in great detail sets forth the facts and circumstances surrounding this claim and the present dispute. This Board Member therefore adopts that statement as her own and will only briefly summarize the facts as needed to explain the holding in this Order.

There is no dispute that claimant sustained a compensable accident on January 11, 2010. Respondent provided treatment and ultimately surgery to claimant's right knee. She was released from treatment by the treating physician in June 2010. Claimant continued to suffer from complications, primarily DVT, and respondent has agreed to provide ongoing treatment for that condition. But as for the balance of claimant's complaints to her low back and right hip, respondent asserts that those complaints are similar in nature to those she expressed just after her December 26, 2009 automobile accident. Alternatively, the medical records contained in the record reveal that claimant has not consistently voiced those complaints since her work-related accident until the time she sought out the opinion of Dr. Fluter.

Claimant, however, continues to maintain that she also injured her low back and right hip in the accident, complaints that were ignored and now in need of further treatment. She also seeks an evaluation of her self-described depression and overall psychological condition. In support of these requests, claimant offers the report of Dr. Fluter who, after reviewing all the relevant medical records and performing his own examination, concluded:

Causation: Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between Ms. Mizell's current condition and the reported injury of 01/11/10.

Given the reported mechanism of injury, Ms. Mizell's low back and right hip were likely affected at that time. In addition, gait alterations requiring weight bearing

restrictions on the right lower extremity have contributed to symptoms affecting the back and right lower extremity.²

The SALJ summarized the medical testimony and concluded as follows:

1. Portions of [c]laimant's testimony; portions of [c]laimant's [h]istory as set forth in Dr. Fluter's report; and portions of [c]laimant's statements regarding her [c]urrent [s]tatus as set forth in Dr. Fluter's report are inconsistent with and contrary to her treating doctor's records.
2. Claimant has failed to bear her burden of proof as required by K.S.A. 44-501(a) and defined in K.S.A. 44-508(g), that her current condition, except with reference to treatment for the DVT in her right leg, which [r]espondent has agreed to provide by Dr. Gorman, is related to the injury she sustained on January 11, 2010; and therefore, [c]laimant's request for change of authorized treatment physician, additional medical treatment to various other body parts and for depression and/or traumatic neurosis, is denied.³

Claimant's appeal followed.

Claimant's argument hinges upon the importance of Dr. Porter's medical records. Simply put, claimant contends that Dr. Porter's records show that claimant's complaints, post-December 26, 2009 and pre-January 11, 2010 involved her neck, thoracic and the lumbar paravertebral muscles and muscles of the gluteal region on the *left*, not the right.⁴ Dr. Porter then saw claimant again on January 13, 2010, after her work-related accident, and notes that claimant has complaints in her lumbosacral joint on the *right* and muscles on her right lower leg.⁵ But in a subsequent visit, his notes indicate that he is going to proceed to treat only those injuries related to her earlier vehicle accident, deferring the treatment of her work-related injuries to another physician.

At that point, claimant's treatment of her knee complaints were assumed by Dr. Larzalere and later, Dr. Daily. The records from these physicians do not correlate with claimant's contention that she injured her low back and right hip in the accident. In fact, one physician's note indicates that claimant reported a history of sciatica dating back a year. That note was dated July 1, 2010.⁶

² P.H. Trans., Cl. Ex. 1 at 5 (Dr. Fluter's Oct. 11, 2010 IME report).

³ ALJ Order (Dec. 22, 2010) at 3.

⁴ Claimant's Brief at 2 (filed Jan. 20, 2011) citing Dr Porter's records from January 8, 2010.

⁵ *Id.*

⁶ P.H. Trans., Cl. Ex. 2 at 21 (Dr. Larzalere's July 2, 2010 office note).

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.⁷

The SALJ concluded that claimant had failed to meet her burden of proof on this issue. And after examining the entire contents of the record, as presently developed, this Board Member is not inclined to disturb the SALJ's findings and conclusions in this matter. Clearly claimant sustained an accident on January 11, 2010, but the clarity of the evidence as to the nature and extent of her injuries is lacking. Claimant's complaints both before and after her work-related injury are very similar. And although she had additional complaints to the right, that can be explained by the fact that claimant injured her right knee in the work-related accident, an injury that subsequently required surgery and now has been complicated by DVT, all of which respondent has provided treatment for. Dr. Flutter's opinions aside, the balance of her complaints are not clearly attributable to the accident. Even Dr. Flutter is somewhat equivocal as his report indicates that the right hip and low back were "likely" affected by her accident. Yet, the medical records placed into evidence do not show consistent low back and right hip complaints. Rather, claimant had right knee complaints and a history of other complaints that predated her work-related injury. Based upon this record, this Board Member finds the SALJ's preliminary hearing Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁸ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Special Administrative Law Judge C. Stanley Nelson dated December 22, 2010, is affirmed.

⁷ *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

⁸ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of February 2011.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
C. Stanley Nelson, Special Administrative Law Judge